

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AT&T COMMUNICATIONS – EAST,
INC., f/k/a AT&T Communications, Inc.,
a Delaware Corporation; AT&T CORP.,
f/k/a American Telephone and Telegraph
Company, a New York Corporation,

Plaintiffs,

v.

CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY, a
Regional Transit Authority; BNSF
RAILWAY COMPANY f/k/a Burlington
Northern and Santa Fe Railway Company,
f/k/a Burlington Northern Railroad
Company,

Defendants.

CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY, a
Regional Transit Authority,

Defendant/Third-
Party Plaintiff,

v.

LEVEL 3 COMMUNICATIONS, LLC, a
foreign limited liability corporation; MCI
COMMUNICATIONS SERVICES, INC.,
d/b/a Verizon Business Services,

Third-Party
Defendants.

CASE NO. C07-5186BHS

ORDER DENYING BNSF
RAILWAY COMPANY'S
FRCP 12(b)(6) MOTION TO
DISMISS AND GRANTING IN
PART AND DENYING IN
PART BNSF RAILWAY
COMPANY'S MOTION FOR
CONTINUANCE

1 This matter comes before the Court on BNSF Railway Company's FRCP 12(b)(6)
2 Motion to Dismiss (Dkt. 56) and BNSF Railway Company's Motion for Continuance
3 (Dkt. 59). The Court has considered the pleadings filed in support of and in opposition¹ to
4 the motions and the remainder of the file and hereby denies the motion to dismiss and
5 grants in part and denies in part the motion for continuance for the reasons stated herein.

6 I. FACTUAL AND PROCEDURAL BACKGROUND

7 On April 17, 2007, AT&T Communications – East, Inc. and AT&T Corp.
8 (“AT&T”) filed a declaratory judgment action. Dkt. 1. The facts, according to the second
9 amended complaint, are as follows: In 1987, AT&T sought to install a fiber optic
10 telecommunications transmissions system and certain equipment and structures along a
11 railroad corridor between Renton, Washington and Eugene, Oregon. Dkt. 48 at 3. The
12 railroad corridor was owned and controlled by Burlington Northern Railroad Company,
13 now known as BNSF Railway Company (“BNSF”). *Id.* On July 21, 1987, AT&T entered
14 into a right-of-way agreement (“the ROW Agreement”) with BNSF whereby BNSF
15 granted AT&T an easement and other rights. *Id.* Pursuant to the ROW Agreement, AT&T
16 constructed and installed fiber optic cable facilities within the railroad corridor between
17 Renton and Eugene, including the BNSF line between Tacoma and Lakewood in the State
18 of Washington. *Id.* at 5.

19 On September 25, 2003, the Central Puget Sound Regional Transit Authority
20 (“Sound Transit”) board of directors authorized the acquisition of certain real property
21 interests owned by BNSF, and BNSF agreed to sell certain real property to Sound Transit
22 in lieu of condemnation. *Id.* By quitclaim deeds, BNSF conveyed to Sound Transit the
23 Lakeview North Rail Line Property, the Lakeview South Rail Line Property, and the
24 Lakeview Stations Property. *Id.* at 6. On September 28, 2004, BNSF assigned all of its
25 rights to any existing easements affecting or relating to the Lakeview North Rail Line

26 ¹ Sound Transit and AT&T were the only parties to respond to BNSF's motion to
27 dismiss. Sound Transit filed an opposition only to request that the Court decide Sound Transit's
28 jurisdictional motion before ruling on BNSF's motion. *See* Dkt. 67 at 2.

1 Property to Sound Transit, and Sound Transit correspondingly assumed all duties and
2 obligations under such easements. *Id.* at 6-7.

3 On July 6, 2006, Sound Transit notified AT&T that Sound Transit acquired
4 BNSF's railroad right-of-way running from M Street in Tacoma to Nisqually,
5 Washington and intended to start construction of two projects within the right-of-way in
6 January of 2007. *Id.* at 7. Sound Transit further notified AT&T that its facilities must be
7 relocated prior to commencement of the work in order to avoid removal of the facilities.
8 *Id.* at 7-8.

9 On August 16, 2006, AT&T provided Sound Transit with a copy of the ROW
10 Agreement and notified Sound Transit that it was entitled to compensation of actual costs
11 and expenses associated with the relocation of its fiber optic cable facilities. *Id.* at 8.

12 Plaintiffs contend that they never consented to an assignment of their rights and
13 obligations under the ROW Agreement to Sound Transit. *Id.* Plaintiffs contend that they
14 are under no obligation to relocate their facilities at their own expense. Plaintiffs seek a
15 judgment declaring that Sound Transit "does not have any authority under the ROW
16 Agreement to require AT&T to relocate its fiber optic cable facilities" and that if Sound
17 Transit has such authority, Plaintiffs are entitled to reimbursement of actual costs and
18 expenses pursuant to the ROW Agreement or to RCW 8.26.010, *et seq.* *Id.* at 10.

19 On July 25, 2007, after the complaint was filed, Plaintiffs' counsel received a copy
20 of an Assignment and Assumption of Third Party Leases/Easements/Licenses between
21 BNSF and Sound Transit. Dkt. 37 at 3. This document apparently contradicts Plaintiffs'
22 belief that BNSF did not assign its rights under the ROW Agreement to Sound Transit.
23 Plaintiffs contend that if BNSF's assignment of the ROW Agreement was valid, BNSF
24 may be in breach of the ROW Agreement.

25 Plaintiffs therefore sought leave of Court to file an amended complaint adding
26 BNSF as a defendant. Dkt. 37. Sound Transit did not oppose the motion but asked the
27 Court to leave all scheduling deadlines as previously set. Dkt. 39. Level 3
28 Communications, LLC ("Level 3") and MCI Communications Services, Inc. ("MCI") did

1 not respond to the motion. The Court granted Plaintiffs leave to amend their complaint
2 and add BNSF as a defendant, and noted that “it appear[ed] that adding BNSF would not
3 disturb the Court’s jurisdiction.” Dkt. 41 at 5. Plaintiffs thereafter filed an amended
4 complaint including BNSF as a defendant. Dkt. 42.

5 BNSF now moves to dismiss, contending that the doctrines of claim preclusion and
6 issue preclusion warrant dismissal of Plaintiffs’ claims. Dkt. 56. More specifically, BNSF
7 contends that the claims and issues raised in the instant case were adjudicated in *AT&T*
8 *Communications-East, Inc. v. BNSF Railway Co*, 2006 WL 3408035 (D. Or.). The facts
9 alleged in that case are as follows:

10 Pursuant to the ROW Agreement, AT&T constructed facilities along BNSF’s
11 railway corridor right-of-way. Section 11(b) of the ROW Agreement entitles AT&T to
12 recovery of actual costs and expenses when AT&T is required to relocate its facilities to
13 accommodate third parties.

14 In 1997, BNSF granted a surface easement to Portland & Western Railroad
15 (“P&W Railroad”), a defendant in the Oregon litigation, to use a portion of the railway
16 corridor. In the Oregon case, P&W Railroad maintained that the ROW Agreement
17 constituted an assignment of BNSF’s rights and obligations under the agreement. By
18 quitclaim deed, BNSF conveyed its interest in certain railway corridors, subject to
19 AT&T’s easement, to the State of Oregon.

20 In 2000, the State of Oregon received approval to construct a commuter rail line
21 along the railway corridor. In November of 2002, AT&T gave notice that the commuter
22 rail line project appeared to conflict with the location of AT&T’s facilities. P&W
23 Railroad requested that AT&T relocate the facilities at AT&T’s expense to accommodate
24 the commuter rail line. In April of 2006, BNSF contended that the relocation of AT&T’s
25 facilities was not governed by the ROW Agreement and that AT&T would therefore be
26 required to address P&W Railroad and other parties directly to seek reimbursement of
27 costs and expenses. AT&T was unable to obtain compensation for expenses and sued
28 under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Uniform Relocation

1 Assistance and Real Property Policies Act of 1970 (“URA”), 42 U.S.C. § 4601. In the
2 Oregon litigation, AT&T sought a declaratory judgment that P&W Railroad and other
3 third parties lacked authority under the Oregon ROW Agreement to require A&T to
4 relocate the facilities and that if the Oregon ROW Agreement conferred such authority,
5 AT&T was entitled to reimbursement.

6 In the Oregon case, the court held that AT&T’s easement ran with the land
7 because BNSF conveyed the underlying property subject to AT&T’s easement. *AT&T*
8 *Communications-East, Inc.*, 2006 WL 3408035 at *8. Because the right to compel AT&T
9 to relocate its facilities at its own expense was a term and condition of AT&T’s easement,
10 the recipient of the conveyed property succeeded to BNSF’s right to compel relocation of
11 AT&T’s facilities under Section 11(a). *Id.*

12 II. BNSF’S MOTION TO DISMISS

13 Motions to dismiss may be based on either the lack of a cognizable legal theory or
14 the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police*
15 *Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted
16 and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295,
17 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require
18 detailed factual allegations but must provide the grounds for entitlement to relief and not
19 merely a “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.*
20 *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege “enough facts to state a
21 claim to relief that is plausible on its face.” *Id.* at 1974. When deciding a motion to
22 dismiss, the Court’s consideration is generally limited to the pleadings. Fed. R. Civ. P.
23 12(d).

24 In this case, BNSF offers three theories in support of its motion to dismiss: (1)
25 AT&T does not allege that BNSF requested or directed AT&T to relocate its fiber optic
26 cable facilities and therefore no claim is stated against BNSF, (2) AT&T’s claims were
27 raised in the Oregon litigation and are therefore barred by the doctrine of claim
28

preclusion, and (3) the issues raised in the instant case were litigated and decided in the Oregon litigation and are therefore barred by the doctrine of issue preclusion. Dkt. 56.

A. MOTION TO STRIKE

AT&T filed a surreply to strike “inaccurate and misleading assertions” in BNSF’s reply brief. Dkt. 73 at 4. AT&T essentially disputes the accuracy of BNSF’s characterization of the Oregon litigation. The Oregon opinion has been filed with the Court as an exhibit, and the Court is therefore capable of reviewing the opinion and is not reliant upon the parties’ quotations or analyses of the opinion. AT&T’s disagreement with BNSF’s analysis of the import and meaning of certain portions of the Oregon opinion is not a proper basis for striking the reply brief.

In addition, the Court declines to consider AT&T’s contention that the Oregon litigation includes different witnesses and evidence. Dkt. 73 at 4. This issue was raised in BNSF’s motion. Dkt. 56 at 11. AT&T had a full and fair opportunity to address the matter in the response and cannot employ a surreply to merely address matters that were raised in the original motion. AT&T’s motion to strike is therefore denied.

B. FAILURE TO STATE A CLAIM

BNSF contends that it has the right, under sections 11(a) and 11(b) of the ROW Agreement, to direct AT&T to relocate its fiber optic cables and facilities and that AT&T fails to state a claim against BNSF because Sound Transit, not BNSF, requested that AT&T relocate its fiber optic cable facilities. Dkt. 56 at 8-9. AT&T does assert two claims that do not hinge upon whether BNSF requested that AT&T relocate its facilities; namely, AT&T seeks a declaration that BNSF’s assignment to Sound Transit is void and seeks damages for breach of contract because BNSF failed to secure AT&T’s written consent to assignment. Dkt. 48 at 12-14. The Court therefore declines to dismiss AT&T’s claims on this ground.

C. CLAIM PRECLUSION

Federal courts sitting in diversity jurisdiction apply the claim preclusion rules of the forum state in which the Court sits unless the law of the forum state is incompatible

1 with federal interests. *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508
 2 (2001). Res judicata, or claim preclusion, bars litigation of any claims that were raised or
 3 could have been raised in the prior action. *Western Radio Servs. Co. v. Glickman*, 123
 4 F.3d 1189, 1192 (9th Cir. 1997). Res judicata applies when there is “1) an identity of
 5 claims, 2) a final judgment on the merits, and 3) identity or privity between parties.” *Id.*
 6 Res judicata applies when the prior judgement and the second action are similar with
 7 respect to the subject matter, the cause of action, the persons and parties, and the quality
 8 of the persons for or against whom the claim is made. *Feminist Women's Health Center v.*
 9 *Codispoti*, 63 F.3d 863, 866 (9th Cir. 1995). A change in the legal theory underlying
 10 claims brought in the first round of litigation will not defeat res judicata. *See Mpooyo v.*
 11 *Litton Electro-Optical Systems*, 430 F.3d 985, 988 (9th Cir. 2005).

12 In this case, AT&T disputes only whether the Oregon case involved different
 13 causes of action because AT&T did not assert a breach of contract claim in the Oregon
 14 litigation and in fact asserted a contrary position, contending that there was no
 15 assignment. Dkt. 65 at 7-8. Similarly, AT&T contends that the cases differ because
 16 AT&T did not contend that BNSF’s assignment to P&W Railroad was invalid. *Id.* at 8.

17 To determine whether the causes of action are identical, courts consider the
 18 following:

19 (1) whether rights or interests established in the prior judgment
 20 would be destroyed or impaired by prosecution of the second action; (2)
 21 whether substantially the same evidence is presented in the two actions; (3)
 22 whether the two suits involve infringement of the same right; and (4)
 23 whether the two suits arise out of the same transactional nucleus of facts.

24 *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982). The last of these
 25 criteria is considered most important, and “[n]o single criterion can decide every res
 26 judicata question [because] identity of causes of action cannot be determined precisely by
 27 mechanistic application of a simple test.” *Feminist Women's Health Center*, 63 F.3d at
 28 867; *Costantini*, 681 F.2d at 1202 n.7.

1. Impairment of Rights and Interests Established in Oregon Litigation

BNSF contends that the Oregon District Court's decision would be destroyed by a contrary result here because the Oregon court determined BNSF and AT&T's rights and obligations under the ROW Agreement and because AT&T's claims are essentially identical. Dkt. 56 at 11. AT&T contends that the Oregon litigation involved different rights and interests because this case includes a breach of contract claim whereas the Oregon litigation did not. Dkt. 65 at 7.

While the Oregon complaint does not include breach of contract as a ground for recovery, AT&T did contest whether BNSF reserved its rights and obligations under the ROW Agreement despite BNSF's conveyance of property. *See* Dkt. 66-2, Exh. A at 4; *AT&T Communications-East, Inc.*, 2006 WL 3408035 at *8. Here too, AT&T contends that BNSF did not assign its rights under the ROW Agreement through BNSF's conveyance to Sound Transit. Dkt. 48 at 9-10. AT&T's contention in the Oregon litigation that there was no assignment of BNSF's rights under the ROW Agreement is not materially different from its contention that BNSF's assignment of its rights under the ROW Agreement in this case is null and void.

Nevertheless, it is unclear whether resolution of this case may impair rights established in the Oregon litigation. Rights established in the Oregon litigation were related to BNSF's conveyance to the State of Oregon. Absent evidence regarding the conveyance in this case and the conveyance in the Oregon litigation, the Court cannot conclude that rights established in the Oregon litigation will be impaired by the resolution of this case.

2. Similarity of Evidence

BNSF contends that this case and the Oregon litigation implicate the same primary witnesses and documents that are substantially the same or identical. Dkt. 56 at 11. While BNSF does no more than assert that the evidence would be similar, AT&T does not refute this contention in the response, and the Court therefore deems the issue admitted.

3. Infringement of the Same Right

AT&T is claiming the infringement of the same right in this matter as in the Oregon litigation. AT&T contends that it is under no obligation to relocate its facilities at its own expense. Dkt. 48 at 9. In the Oregon litigation, AT&T similarly contended that it was not obligated to relocate its facilities and was entitled to reimbursement to the extent that relocation was required. Dkt. 66-2, Exh. A at 8.

4. Same Transactional Nucleus of Facts

The Court is not persuaded that the Oregon litigation and this case arise from the same transactional nucleus of facts. The Oregon litigation centered on BNSF's conveyance of rail corridors located in Oregon to the State of Oregon. This case centers on BSNF's conveyance of property located in a different state to a different party. The only similarities between the Oregon case and this case are the identities of AT&T and BSNF and the ROW Agreement. These similarities do not persuade the Court that AT&T is attempting to relitigate claims that were raised or could have been raised in the Oregon case. In this respect, BNSF's Motion to Dismiss (Dkt. 56) is denied.

D. ISSUE PRECLUSION

Federal courts sitting in diversity jurisdiction apply the issue preclusion rules of the forum state. *Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994). Washington courts apply federal law to determine the preclusive effect of prior federal judgments. *Id.* Collateral estoppel, or issue preclusion, prevents relitigation of issues actually litigated and necessarily decided where there has been a prior proceeding and a full and fair opportunity for litigation in that proceeding. *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005), *abrogated on other grounds by Taylor v. Sturgell*, 128 S. Ct. 2161 (2008). A federal court decision has a preclusive effect if (1) the issue necessarily decided during previous proceeding is identical to the one in the instant matter; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was either a party, or is in privity with a party, in the first proceeding. *Id.*

1 When deciding whether the issue decided in the previous proceeding is identical,
2 the Court considers the following:

3 (1) is there a substantial overlap between the evidence or argument
4 to be advanced in the second proceeding and that advanced in the first?

5 (2) does the new evidence or argument involve the application of
6 the same rule of law as that involved in the prior proceeding?

7 (3) could pretrial preparation and discovery related to the matter
8 presented in the first action reasonably be expected to have embraced the
9 matter sought to be presented in the second?

10 (4) how closely related are the claims involved in the two
11 proceedings?

12 *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1116 (9th Cir. 1999). If there is any
13 doubt as to whether the issue was actually adjudicated in the prior proceeding, collateral
14 estoppel will not apply. *Harris v. Jacobs*, 621 F.2d 341, 343 (9th Cir. 1980).

15 With respect to the third prong, privity is a legal conclusion “designating a person
16 so identified in interest with a party to former litigation that he represents precisely the
17 same right in respect to the subject matter involved.” *Kourtis*, 419 F.3d at 996. To bind
18 litigants to a judgment rendered in an earlier litigation to which they were not parties
19 violates notions of due process unless the litigants were adequately represented in the
20 previous litigation. *Id.*

21 AT&T contends that several issues raised in this case were not litigated or
22 necessarily decided in the Oregon litigation. Dkt. 65 at 9. In the Oregon litigation, the
23 court decided whether “AT&T’s obligation to relocate at its expense survived BNSF’s
24 conveyance of the railroad right of way” to the State of Oregon. *AT&T Communications-*
25 *East, Inc.*, 2006 WL 3408035 at *7. This case raises the question of whether AT&T is
26 obligated to relocate its facilities at its own expense despite BNSF’s conveyance of
27 different property to a different party, an issue that was not squarely decided in the
28 Oregon litigation. The Court therefore concludes that issues raised in the instant matter
are not subject to issue preclusion, and BNSF’s motion to dismiss is denied.

29 III. MOTION FOR CONTINUANCE

30 BNSF moves for a continuance of the trial date and all pretrial deadlines on the
31 grounds that BSNF was only recently added as a party and has not had sufficient time to

1 conduct discovery and prepare for trial. Dkt. 59. Trial is currently scheduled for October
2 27, 2008. Dkt. 36. BNSF was made a party on December 4, 2007. Dkt. 42. BNSF seeks a
3 continuance of six months. Sound Transit opposes the length of the proposed continuance
4 on the grounds that such a lengthy continuance would interfere with construction of the
5 Sounder commuter rail system. *See* Dkt. 64 at 2.


6 Trial courts have broad discretion in deciding whether to grant or deny a request
7 for a continuance. *U.S. v. Flynt*, 756 F.2d 1352, 1358 (1985), *amended by* 764 F.2d 675
8 (9th Cir. 1985). Given BNSF's relatively recent entry into this case, the Court agrees that
9 a continuance of the trial date and certain pretrial deadlines is appropriate. The Court is
10 concerned, however, that the six-month continuance requested by BNSF may cause
11 unnecessary prejudice to Sound Transit. The Court therefore concludes that a shorter
12 continuance is proper, without prejudice to the parties seeking a longer continuance at a
13 later date.

14 IV. ORDER

15 Therefore, it is hereby

16 **ORDERED** that BNSF Railway Company's FRCP 12(b)(6) Motion to Dismiss
17 (Dkt. 56) is **DENIED**, and BNSF Railway Company's Motion for Continuance (Dkt. 59)
18 is **GRANTED in part** and **DENIED in part** as provided herein and as follows: The trial
19 date in this matter is continued to January 20, 2009, at 9:00 a.m., and the Clerk of Cou
20 will enter a minute order resetting pretrial deadlines.

21 DATED this 14th day of July, 2008.

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23 
24 BENJAMIN H. SETTLE
25 United States District Judge
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